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Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

Eric C. McCleary; Douglas A. Kepler, d/b/a Damariscotta

v.

Javed Mirza, individually and in his official capacity as District Mining Manager of the Pennsylvania Department of Environmental Protection; Ernest Giovannitti, individually and in his official capacity as the Director of the Bureau of Mining and Reclamation of the Pennsylvania Department Protection; James E. Sief, individually and in his capacity as the Secretary of the Pennsylvania Department of Environmental Protection

Eric C. McCleary; Douglas A. Kepler, d/b/a Damariscotta.,
Petitioners

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Is not the Liberty interest implicated where a public official who is vested with state authority over the subject matter of a citizen's business within a twelve county area, wrongfully excludes that citizen from competing for work within his jurisdiction ?

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PETITION FOR WRIT OF CERTIORARI

Eric C. Mccleary; Douglas A. Kepler, d/b/a Damariscotta ("Damariscotta"), pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 21, 1999, in order to address an important question of Federal Constitutional law that has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reprinted in Appendix A hereto.

JURISDICTION

Petitioner seeks review of the Order of the United States Court of Appeals for the Third Circuit entered in these proceeding on December 21, 1999 (reprinted in Appendix A hereto). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment Fourteen, Section One to the Constitution of the United States provides in pertinent part:

> *...Nor shall any State deprive any person of life, liberty, or property, without due process of law...*

Title 42, Section 1983 of the United States Code provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

STATEMENT OF THE CASE

This petition arises from the dismissal on summary judgment of the procedural and substantive due process claims of Eric C. McCleary and Douglas A. Kepler, partners d/b/a Damariscotta as plaintiffs (the "plaintiffs") against Javed Mirza, Ernest Giovannitti and James E. Sief, all officials of the Pennsylvania Department of Environmental Protection (the "defendants"). Plaintiffs complained under §1983 of the Civil Rights Act, 42 U.S.C. §1983 that they had been deprived of their liberty to engage in their chosen profession by the wrongful and intentional conduct of the government defendants (their substantive claim) and by the utter absence of any procedure under state law by which they might have challenged and redressed that conduct (their procedural claim).

In affirming the District Court's grant of summary judgment in favor of the defendants, the Third Circuit Court of Appeals, conceding that the record before it sufficiently evidenced genuine issues of fact with respect to the underlying tort (that plaintiffs had been wrongfully excluded

from competition for contracts requiring the Defendants' approval within a twelve County area of Pennsylvania), concluded that such facts were nevertheless insufficient in scope to implicate the Liberty interest.

That record, consisting of depositions and affidavits, supports the following narrative of relevant facts.

The administration and enforcement of mining regulations by the Pennsylvania Department of Environmental Protection (PADEP) is accomplished through a decentralized system of district mining offices (DMO's), each headed by a District Mining Manager (DMM). By internal design, PADEP vests in each DMM final authority in all permit and enforcement matters affecting the mining industry within his district.

The Knox DMO comprises twelve counties in northwestern Pennsylvania and extends to the New York and Ohio borders on the west and Allegheny County on the South. The Knox District contains the highest concentrations of acid mine drainage (AMD) sites within the Commonwealth of Pennsylvania.

Defendant Javed Mirza ("Mirza") is the DMM of the Knox DMO. Within that district, no person who is subject to PADEP jurisdiction may undertake to remediate AMD without a plan approved by Mirza. This of course includes sureties who bond the obligations of the permittees who mine the coal. Because Mirza's decisions with respect to permitees and sureties are administratively final, the power to determine whether, to what extent and by whom any AMD within the twelve county district will be remediated, rests exclusively with Mirza. There is no pre-approval review by any superior of any of his decisions to determine conformity with Department policy, and but for routine performance reviews, Mirza wields unfettered power in these respects.

Plaintiffs are environmental scientists who are specifically engaged in the business of research, development and implementation of ecologically sound (non-chemical) and highly cost effective passive treatment systems for AMD. They have located their business in the Knox district precisely because it is an incomparable natural laboratory for their research and development owing to the exceptionally high concentration of AMD sites there situated and the concomitant concentration of permitees and sureties who are eager to retain their services with a view toward finding less

costly treatment methodologies. Plaintiffs, as scientists, are internationally known for their scholarly publications in the field of passive treatment and, since entering the field in practice, have exponentially furthered the efficacy of passive treatment through innovative technologies such as their invention of the Successive Alkalinity Producing System (SAPS). Significantly, their innovations have attained results theretofore thought impossible, including the ability to remove, and even recover commercial quantities of aluminum from AMD sites without chemicals through passive means.

In or about the winter of 1993, a large coal mining company, Glacial Minerals, Inc. (Glacial) ceased operations, leaving some 28 separate AMD sites unremediated. Glacial's surety, CIGNA, thereby became confronted with the business decision as to whether to offer to remediate these sites itself with a view toward mitigating loss, or to simply acquiesce to forfeiture. Utica Insurance Company, also a surety of Glacial, confronted an identical problem . The total dollar amount at stake was in excess of four million dollars in bond obligations.

Utica and CIGNA jointly retained the services of Plaintiffs to develop a plan for the passive remediation of all 28 of the AMD sites with the understanding that if the plan were accepted by Mirza, Plaintiffs would continue to be retained to oversee the implementation of the plan and the construction of the systems required by it.

In May of 1994 CIGNA and Utica formally presented to Mirza their proposal, based on Plaintiffs' plan, to undertake the remediation of all 28 AMD sites on the Glacial properties to regulatory standards, except for manganese, which was proposed to be treated using the "best available technology" in accordance with current departmental policy (because of the unavailability of efficacious technology, PADEP did not strictly enforce the regulatory standard for manganese). The plan however was rejected by Mirza on the pretext that the remediation design did not provide for the treatment of manganese to effluent levels required by the regulations. Mirza then directed his staff to commence forfeiture proceedings on all of the bonds. By October 3, 1994, all four million dollars in bonds had been declared forfeit by the Knox District Office.

The sureties appealed these forfeitures. Settlement discussions ultimately resulted in a Consent Decree pursuant to which the sureties agreed to pay 3.1 million dollars in bond forfeitures in exchange for a complete release from all obligation to remediate 25 of the 28 AMD sites. With respect to the 3 remaining sites, the sureties were permitted to use, just as plaintiffs had originally proposed, the "best available technology" with respect to manganese .

When Plaintiffs learned of this development, they approached Mirza both to register their concern that 25 of the 28 Glacial AMD sites would become untreated "orphans" and to inquire as to what policy lay behind the decision. At a meeting between Mirza and Plaintiff Kepler, Mirza became abusive and threatened to destroy Plaintiffs' business if they interfered in any way with his decision in the matter.

The sureties, who had determined that their best financial and legal interests lay with complying with Mirza's wishes prevailed upon plaintiffs make no further complaint concerning Mirza's handling of the Glacial Minerals matter. Plaintiffs accordingly resigned themselves to the loss of the business opportunity to remediate all 28 of the Glacial AMD sites, but continued to be genuinely concerned that Mirza's

decision in the matter would result in proliferation of "orphan" sites within the district.

Orphan sites are those AMD sites for which there is no longer any private entity answerable for remediation. Their concern arose from the fact that a substantial portion of forfeited bond funds, which were supposed to be used to remediate the sites for which they were posted, never seemed to find their way back into the District for that purpose. Upon investigation the plaintiffs determined that of the some 5.5 million dollars in bond forfeitures collected on AMD sites within the District since 1990 (which number does not include the 3.1 million collected from Glacial's sureties), only a little more than $175,000 was actually used for the purpose of remediating AMD within the District.

In the fall of 1994 Plaintiffs attended an AMD conference at Morgantown, West Virginia. Still concerned that they did not understand the policy lying behind the decision made in the Glacial Minerals matter, they informally approached Terry Fabian, the then PADEP Deputy Director for Mining, the Defendant Ernest Giovannitti, and Mr. Fabian's assistant, Eric Conrad in a public lounge area at the conference center. Plaintiffs asked for an explanation of the

policy of PADEP lying behind the decision made in the Glacial Minerals matter. They were given no explanation.

Upon learning of plaintiffs' inquiries, Mirza became angry and approached Robert Hedin, a colleague of Plaintiffs' from another district who was also at the conference. Mirza, making clear that he was intent on disrupting Plaintiffs' business, solicited Hedin's willingness to begin doing work in the Knox district. At this point in time, Hedin and plaintiffs were the only recognized experts in the field of passive treatment within all of Pennsylvania .

During this same period of time, Plaintiffs had a chance encounter with the then newly appointed Deputy Secretary for Mining, Robert Dolence with whom they discussed their problems with Mirza. Deputy Dolence advised Plaintiffs that it was unlikely anything could be done because "Mirza is a money getter" for the Department, and Plaintiffs needed to understand that "money is power".

About this same time, Plaintiffs had been working to develop a remediation plan for Hanley Brick, Inc. (Hanley), the owner of a clay mine in the district which had ceased all operations except those in connection with its continuing

obligation to treat an existing AMD at its site. Hanely was then currently treating the AMD by chemical means at a cost of approximately $90,000.00 per year. Hanley desired to unburden itself of this ongoing obligation. Believing that converting to a passive treatment system might be the answer, Hanley retained the services of Plaintiffs to come up with a plan.

Plaintiffs determined that because of the unique characteristics of the Hanley discharge, it would be impractical to passively treat the discharge to the point-source effluent criteria required by PADEP. Plaintiffs determined however that notwithstanding that Hanley was presently treating the discharge to effluent standards using a chemical technique, the presence of "orphan" discharges just downstream of the Hanley discharge negated any appreciable benefit to the Commonwealth's waters. Plaintiffs accordingly proposed to Hanley a plan under which Hanley would passively treat not only its own discharge, but the several downstream discharges, with the result that the total effluent load on the steam would be substantially reduced.

Recognizing that the Pennsylvania regulations measure compliance with the effluent standards at the point

of discharge and not by stream effluent load, it was well understood that the proposal could not be approved through normal channels and would require either some special dispensation as a pilot program at the deputy secretary level, or, an adversary proceeding (as in the Glacial Minerals matter) which would free the Department to depart from the stricter standards of the regulations. Plaintiffs, with the assistance of various individuals in the Department, managed to convene on June 2, 1995 a meeting among Robert Dolence, Deputy Secretary for Mineral Resources Management, Paul Linnan, Director of District Mining Operations, Defendant Ernie Giovannitti, then Director of Bureau of Mining and Reclamation, Defendant Mirza, and as well representatives from the National Mine Land Reclamation Center, the Pennsylvania Fish Commission, the Environmental Protection Agency and several scientists active in the field of watershed restoration, for the purposes of discussing both the potential efficacy and the legality of the proposed plan. Those attending generally regarded the plan as a win-win situation, and it was suggested to Plaintiffs that before attempting to address what legal framework might accommodate the plan, Plaintiffs should gather additional supportive data demonstrating the beneficial impact that the plan would have on the stream and aquatic life.

Prior to this meeting, Plaintiffs had enlisted the assistance of state Representative Samuel H. Smith of the 66th Legislative District. Representative Smith by letter of April 5, 1995 to Defendant Seif, expressed enthusiasm for the plan and encouraged its acceptance. In response, Secretary Seif assigned the matter as a special project to Defendant Giovannitti on or about June 5, 1995, just three days after Giovannitti's attendance at the above-described meeting.

When however Plaintiffs attempted to coordinate their efforts with Defendant Giovannitti, he inexplicably abdicated all responsibility back to Mirza notwithstanding his knowledge of the animus between Mirza and the Plaintiffs.

Hanley had committed to spend in excess of two million dollars on the project. In view of the fact that it otherwise would confront a continuing expense of $90,000.00 per year in chemical treatment costs, Hanley had a great deal at stake and could not afford to take Mirza to task. By the end of June of 1995, it became clear that Mirza would under no circumstances cooperate in the development of this innovative plan. He formally rejected it by letter of June 28, 1995 addressed to Plaintiffs and Hanley. As a

result, Hanley began to explore directly with Mirza without Plaintiffs' assistance other possible options and ultimately entered into a Consent Decree pursuant to which, in exchange for Hanley's payment of 2.4 million dollars into a trust controlled by Mirza, Hanley was released from the obligation to treat its original discharge to effluent standards and committed only to do certain limited remediation elsewhere for which it hired Robert Hedin .

Also, during the same time frame surrounding Mirza's threat to destroy Plaintiffs' business, C&K Coal Company, another large strip mining company, had solicited Plaintiffs' assistance in a large project which involved designing passive treatment systems for its numerous mining sites within the district. Because of the size of the potential project, Plaintiffs enlisted the assistance of Robert Hedin and proposals were developed co-jointly by Hedin and the Plaintiffs for C&K. Subsequent however to the threats made by Mirza, Plaintiffs were eliminated from the proposal and Robert Hedin alone was engaged by C&K.

Since Mirza threatened Plaintiffs with destruction of their business Mirza has made clear to his staff and others in the industry that plaintiffs involvement in projects within his

district is unwanted. In point of fact, Plaintiffs have since not been retained to date by even one surety or permittee with respect to remediation requiring approval by the Knox district and their ability to continue research, development and implementation of passive treatment systems in that most ideal of natural laboratories has been utterly destroyed.

ARGUMENT

This Court has made clear that the Constitutional requirement of due process applies only to interests encompassed within the concepts of "life", "liberty" and "property", but that the range of such interests is not infinite. *Board of Regents of State Colleges vs. Roth*, 408 U.S. 564, 572-577, 92 S Ct. 2701, 2706-2709, 33 L Ed 2d 548 (1972). Nevertheless, the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference has long been held by this Court to come within the ambit of these protections. *Greene vs. McElroy*, 360 U.S. 474, 492, 79 S Ct. 1400, 1411, 3 L Ed 2d 1377 (1959).

In *Board of Regents, supra.*, this Court recognized that under certain circumstances the right to pursue a chosen occupation can implicate the "property" interest and in others the "liberty" interest, but that the standard for each is different. In that case the plaintiff claimed that both his

liberty and property interests were violated by state institution who refused to renew his teaching contract. The Court made a rather straightforward determination that the plaintiff could not have a Constitutionally protected property interest in a contract of employment which had come to an end. More troublesome was whether he nevertheless had a protected liberty interest, and for that the Court looked to whether he had as a result of the conduct been stigmatized or suffered any other disability that "...foreclosed his freedom to take advantage of other employment opportunities...". Since clearly under the facts of that case the plaintiff was neither stigmatized nor otherwise disabled from similar employment, the Court concluded that the plaintiff's claim fell short of implicating the liberty interest.

Since *Board of Regents*, however, this Court has not further elucidated the 'foreclosure from employment opportunities' standard. The Circuit Courts of Appeal have consequently approached the subject with conflicting interpretations as to what this Court intended. See *Cowan v. Corley*, 814 F.2d 223, 227 (5th Cir. 1987); *Latessa vs. New Jersey Racing Commission*, 113 F 3d 1313 (3d Cir. 1997); *Piecknick vs. Commonwealth of Pennsylvania*, 36 F.3d 1250 (3d Cir. 1994); *Bernard vs. United Township High School*

District, 5 F.3d 1090 (Seventh Cir. 1993); *Wroblewski vs. City of Washburn*, 965 F.2d 452 (7th Cir. 1992); *Herz vs. Degnan*, 648 F.2d 201 (Third Cir. 1981).

The conflicting interpretations are perhaps best illustrated by a comparison of the present case to the Fifth Circuit decision in *Cowan vs. Corley, supra.* In *Cowan* the Fifth Circuit held that the liberty interest was implicated where a towing operator became unable to compete for its fair share of the local towing business because the sheriff, who referred all county jobs to members of a certain towing association which he controlled, expelled the plaintiff from that association. Clearly, the plaintiff in that case was not completely foreclosed from plying his chosen occupation, he was simply foreclosed from jobs controlled by the sheriff. Additionally, he was free to ply his trade elsewhere if he chose.

The fact situation in the present case is indistinguishable, if not more compelling by the breadth of its tainted geography. Here, the plaintiffs have been excluded from competing for jobs controlled by a government official, not merely in one county, but in twelve. Nevertheless, the Third Circuit has in this case reached an opposite result.

Neither Court fully explained its conclusions in the context of the standard adopted by this Court in *Board of Regents, supra.* All that really can be gleaned from the opinions is that in the Fifth Circuit, the liberty interest may be implicated even if the plaintiff is not quantitatively foreclosed from all possible avenues of plying his occupation; and in the Third Circuit, the implication of the liberty interest requires a more dire injury than that suffered by either the plaintiff in *Cowan* or the plaintiffs here. Both cases nevertheless imply that a qualitative, rather than a quantitative analysis, is the proper approach to the question.

This petition seeks in the interest of uniformity and equal protection that this Court resolve the conflict by granting certiorari in this case. Your petitioners believe their case to be a worthy vehicle for the resolution of that conflict in that its facts give rise to the most insidious sort of abuse of governmental power – the unofficial insistence by a public official upon obedience to his private agenda by persons (plaintiffs' would-be clients) who are reliant on the favorable exercise of his official public duties.

Respectfully submitted,

By _____
Joseph E. Altomare, Esquire
Petitioner's Attorney of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-3358

ERIC C. McCLEARY;
DOUGLAS A. KEPLER, d/b/a DAMARISCOTTA

APPELLANTS

v.

JAVED MIRZA, individually and in his official capacity as District Mining Manager of the Pennsylvania Department of Environmental Protection; ERNEST GIOVANNITTI, individually and in his official capacity as the Director of the Bureau of Mining and Reclamation of the Pennsylvania Department Protection; JAMES E. SIEF, individually and in his capacity as the Secretary of the Pennsylvania Department of Environmental Protection

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Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 96-cv-00061)
District Judge: Honorable Sean J. McLaughlin

Argued: October 28, 1999
Before: MANSMANN, ROTH and WEISS,
Circuit Judges

(Filed: December 21, 1999)

MEMORANDUM OPINION OF THE COURT

WEIS, Circuit Judge.

Plaintiffs are partners in a company that designs passive treatment systems for acid drainage from coal mines. They offer their services to mining companies and sureties on bonds guaranteeing compliance with environmental regulations. Many of the sites with drainage problems that come within the scope of the plaintiffs' business lie within the Knox District in a twelve-county region in northwestern Pennsylvania.

Defendants are employees of the Pennsylvania Department of Environmental Protection. Defendant Javed Mirza is the District Mining Manager of the Knox District and is at the center of the conduct alleged in the plaintiffs' complaint.

Any plan to remediate acid mine drainage by a party under the jurisdiction of the Pennsylvania Department of Environmental Protection requires the approval of the District Mining Manager. These plans, for example, may be submitted by a surety company following the principal's default on the

permit obligations. In these situations, a surety must choose between the cost of implementing a remediation plan, and forfeiture of the bond to the Department.

Plaintiffs contend that Mirza has demonstrated personal hostility by indicating to mining companies and sureties that he would deny a permit for plans that plaintiffs design. They allege that he threatened to drive them out of business and for this reason deliberately brought one of their competitors into the Knox region. Plaintiffs included in the record a number of instances where Mirza's activity resulted in concrete harm to their business in the Knox District. They contend that they have been deprived of a liberty interest under the Fourteenth Amendment, specifically the right to pursue their livelihood.

The District Court granted the defendants' motion for summary judgment in a comprehensive opinion, stating that although the plaintiffs' right to pursue their occupation was "possibly curtailed or limited in some way, [it] was not 'severely limited', unreasonably altered or outright deprived by the conduct of the defendants." The record disclosed that despite the harm defendants allegedly caused, plaintiffs were active in their business, currently working on projects outside Mirza's jurisdiction, within and without the state.

To establish a section 1983 civil rights claim, a plaintiff must demonstrate that the conduct complained of was

committed by a person acting under color of state law and the plaintiff was deprived of rights, privileges or immunities secured by the Constitution or the laws of the United States. *Riley vs. Jeffes*, 777 F.2d 143, 145 (3d Cir. 1985). A classic section 1983 claim seeks to remedy abusive conduct by state officials. To that extent, the plaintiffs' allegations against Mirza fit the mold. But that in itself is not enough. To survive a motion for summary judgment, plaintiffs must also present evidence which permits the inference that the challenged conduct caused a constitutional violation. In this respect, the plaintiffs' case falters.

The liberty protected by the Due Process Clause includes the right to follow a trade, profession, or other calling. *Wroblewski vs. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992). In *Piecknick vs. Commonwealth of Pa.*, 36 F.3d 1250, 1262 (3d Cir. 1994), we pointed out that "[i[t is the liberty to pursue a particular calling or occupation and not the right to a specific job that is protected by the Fourteenth Amendment." See also *Bernard vs. United Twp. H.S. Dist.*, 5 F.3d 1090, 1092 (7th cir. 1993).

Plaintiffs contend that the state action here is akin to that in *Herz vs. Degnan*, 648 F.2d 201 (3d Cir. 1981), where a state board was barred from revoking the plaintiff's license to practice as a psychologist. In the present appeal, plaintiffs

argue that their difficulty in plying their trade in the Knox District is equivalent to the statewide exclusion that existed in *Herz*. The facts alleged here, however, are not so sweeping that they present as complete a proscription from the practice of their occupation as existed in *Herz*. Therefore, we cannot agree that the threshold consideration – infringement of the right to practice an occupation – has been met. Assuming plaintiffs' allegations to be correct, Mirza may have improperly interfered with their business interests in violation of state law, but that does not in itself establish a federal constitutional violation.

That plaintiffs also assert damage to their reputation does not alter the conclusion. Such injury does not find a remedy under the federal Constitution. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976); *Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1078 (3d Cir. 1997)) ("even financial injury due solely to government defamation does not constitute a claim for deprivation of a constitutional liberty interest."); *Clark v. Township of Falls*, 890 F.2d 611, 620 (3d Cir. 1989); *Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir. 1987). We point out that although plaintiffs have been unable to establish a violation of the federal Constitution, that does not foreclose them from pursuing remedies before the state courts and state administrative agencies.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-3358

ERIC C. McCLEARY, etc. et al

APPELLANTS

v.

JAVED MIRZA, etc. et al

Appeal From The United States District Court For The Western District Of Pennsylvania

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Before: MANSMANN, ROTH and WEISS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court For The Western District Of Pennsylvania and was argued by counsel on October 28, 1999.

On Consideration whereof, it is now ordered and adjudged by this Court that the judgment of the District Court entered April 1, 1999 be and the same is hereby affirmed.

Costs taxed against appellants.

Dated: December 21, 1999

ATTEST:

/Clerk/